

FILED
SUPREME COURT
STATE OF WASHINGTON
9/27/2019 3:33 PM
BY SUSAN L. CARLSON
CLERK

FILED
SUPREME COURT
STATE OF WASHINGTON
10/8/2019
BY SUSAN L. CARLSON
CLERK

No. 96990-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

NICOLE BEDNARCZYK and CATHERINE SELIN, individually and on
behalf of all others similarly situated,

Petitioners/Plaintiffs,

v.

KING COUNTY, A MUNICIPAL CORPORATION,

Respondent/Defendant.

BRIEF OF *AMICI CURIAE*
WASHINGTON STATE ASSOCIATION OF COUNTIES AND
WASHINGTON STATE ASSOCIATION OF COUNTY CLERKS

PAMELA B. LOGINSKY
Staff Attorney
Washington Association of
Prosecuting Attorneys
206 10th Ave. SE
Olympia, WA 98501
(360) 753-2175

TABLE OF CONTENTS

I. INTRODUCTION	1
II. INTEREST OF <i>AMICI CURIAE</i>	1
III. ARGUMENT	3
A. SIGNIFICANT HARM ARISES WHEN THE JUDICIAL BRANCH SUBSTITUTES ITS JUDGMENT FOR THAT OF THE LEGISLATIVE BRANCH.	3
1. Increased Juror Compensation May Hurt the Very Individuals the Petitioners and Their <i>Amici Curiae</i> Seek to Help	6
2. Increased Juror Compensation is Not a Silver Bullet	11
B. INCREASED JUROR COMPENSATION IS NOT CONSTITUTIONALLY REQUIRED	13
1. No Constitutional Right to Any Compensation for Performing Civic Duties	15
2. The Equal Protection Clause Does Not Require the State to Eliminate All Inequalities Between the Rich and the Poor	16
3. The Constitutional Right to an Impartial Jury Drawn from a Fair Cross Section of the Community is Not Violated by the Private Choices of Potential Jurors	20
IV. CONCLUSION	22

TABLE OF AUTHORITIES

TABLE OF CASES

<i>Batson v. Kentucky</i> , 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).....	19
<i>Blair v. United States</i> , 250 U.S. 273, 281, 39 S. Ct. 468, 471, 63 L. Ed. 979 (1919)	15
<i>City of Ellensburg v. State</i> , 118 Wn.2d 709, 826 P.2d 1081 (1992)	5
<i>Daly v. Multnomah County</i> , 14 Ore. 20, 12 P. 11 (1886)	15
<i>Duren v. Missouri</i> , 439 U.S. 357, 99 S. Ct. 664, 58 L. Ed.2d 579 (1979).....	20
<i>Eggleston v. Pierce County</i> , 148 Wn.2d 760, 64 P.3d 618 (2003)	15
<i>Emery v. State</i> , 297 Ore. 755, 688 P.2d 72, 79 (1984)	15
<i>Freedom Foundation v. Gregoire</i> , 178 Wn.2d 686, 310 P.3d 1252 (2013).....	3
<i>Harper v. Virginia Bd. of Elections</i> , 383 U.S. 663, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966)	17, 18
<i>Hillis v. Department of Ecology</i> , 131 Wn.2d 373, 932 P.2d 139 (1997)	4, 5
<i>Hurtado v. United States</i> , 410 U.S. 578, 93 S. Ct. 1157, 35 L. Ed. 2d 508 (1973)	15
<i>In re Salary of Juvenile Director</i> , 87 Wn.2d 232, 552 P.2d 163 (1976)	5
<i>J.E.B. v. Alabama ex rel. T.B.</i> , 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994)	16, 19

<i>Madison v. State</i> , 161 Wn.2d 85, 163 P.3d 757 (2007)	17
<i>Ohio Democratic Party v. Husted</i> , 834 F.3d 620 (6th Cir. 2016).....	18
<i>Patierno v. State</i> , 391 So.2d 391 (Fla. Dist. Ct. App. 1980)	3
<i>People v. Burgener</i> , 62 P.3d 1 (Cal. 2003)	22
<i>Powers v. Ohio</i> , 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991).....	19
<i>Smith v. Berghuis</i> , 543 F.3d 326 (6th Cir. 2008), <i>rev'd on other</i> <i>grounds by Berghuis v. Smith</i> , 559 U.S. 314, 130 S. Ct. 1382, 176 L. Ed. 2d 249 (2010)	21
<i>State ex rel. Farmer v. Austin</i> , 186 Wash. 577, 59 P.2d 379 (1936)	4
<i>State ex rel. Hastie v. Lamping</i> , 25 Wash. 278, 65 Pac. 537 (1901)	3, 16
<i>State v. Cienfuegos</i> , 144 Wn.2d 222, 25 P.3d 1011 (2001)	20
<i>State v. Harner</i> , 153 Wn.2d 228, 103 P.3d 738 (2004)	7
<i>State v. Roberts</i> , 948 S.W.2d 577 (Mo. 1997)	22
<i>Taylor v. Louisiana</i> , 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975).....	20, 21
<i>Thiel v. Southern Pac. Co.</i> , 328 U.S. 217, 66 S. Ct. 984, 90 L. Ed. 2d 1181 (1946).....	15, 16, 18, 21
<i>United States v. Cecil</i> , 836 F.2d 1431 (4th Cir. 1988)	21
<i>United States v. Orange</i> , 447 F.3d 792 (10th Cir. 2006)	21
<i>United States v. Rioux</i> , 97 F.3d 648 (2nd Cir. 1996)	21

CONSTITUTIONS

Equal Protection Clause of the Fourteenth Amendment	14, 18
Oregon Const. art. 1, § 18 (1857)	15
Sixth Amendment	14, 20, 21
Washington Const. art. I, § 16	15

STATUTES

Chapter 2.30 RCW	7
Chapter 2.36 RCW	14, 16, 17, 20
Chapter 29A.08 RCW	18
H.B. 1937, 61st Leg. Sess. (Wn. 2009)	3
N.M. Stat. Ann. 38-5-15	10
New Mexico Laws 1969, ch. 222, § 15	10
RCW 11.88.170	7
RCW 12.12.030	10
RCW 2.36.054	2, 17
RCW 2.36.055	14, 17, 18
RCW 2.36.065	14, 17
RCW 2.36.080(1)	20
RCW 2.36.080(3)	14, 16, 19
RCW 2.36.080(4)	19

RCW 2.36.095	2
RCW 2.36.150	3, 5, 6, 10, 13, 17
RCW 26.12.240	7
RCW 29A.08.112	18
RCW 29A.08.120	19
RCW 29A.08.123	19
RCW 29A.08.310	19
RCW 29A.08.340	19
RCW 36.18.016(3)	10
RCW 4.44.130	9
RCW 43.135.060	6
S.B. 5454, 59th Leg. Sess. (Wn. 2005).....	3
S.B. 6779, 60th Leg. Sess. (Wn. 2008).....	3
S.S.B. 5072, 57th Leg. Sess. (Wn. 2001)	3

RULES AND REGULATIONS

CRLJ 38(d)(3).....	9
CrRLJ 6.4(e)(1).....	9
GR 18	17, 18
GR 28(b)(1)	2
GR 37(h)(vi)	19

New Mexico Rule 1-038 NMRA	11
----------------------------------	----

OTHER AUTHORITIES

Annual Caseload Report Superior Court 2017 Annual Report.....	8
Caseloads of the Courts Superior Court Criminal Trial Proceedings by Type of Proceeding – January 2019 through August 2019.....	6, 9
Caseloads of the Courts, Superior Court Civil Proceedings by Type or Proceeding – January 2019 through August 2019	6
Caseloads of the Courts, Washington Courts of Limited Jurisdiction Jury Trials Set and Held – January 2019 through July 2019	5
Dan Hammock, “Elma man found guilty of first-degree murder, arson in 2016 case,” <i>The Vidette</i> , Oct. 26, 2017.....	9
Final Report, The Nebraska Minority and Justice Task Force, State Justice Institute (Jan. 2003)	11
Grays Harbor County 2019 Budget	8, 9
Hiroshi Fukurai et al., <i>Race and the Jury: Racial Disenfran- chisement and the Search for Justice</i> 18-21 (1993)	11
Hon. Gregory E. Mize (ret.), et al, <i>The State-of-the States Survey of Jury Improvement Efforts: A Compendium Report</i> (Apr. 2007).....	13
KANW-FM, “The Latest: New Mexico courts say jury money almost gone,” Feb. 27, 2017	11
Municipal Research and Service Center, Tax and Population Data, County tax and population trends (Excel)– 2010 to present (last updated July 2, 2019)	8

Municipal Research and Service Center, Washington County Profiles	7
Municipal Research and Services Center, <i>Revenue Guide for Washington Counties</i> (Feb. 2019).....	7
Nancy J. King, <i>Racial Jurymandering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection</i> , 68 N.Y.U. L. REV. 707 (1993)	12
New Mexico Department of Workforce Solutions, Minimum Wage Information	10
Nina W. Chernoff, <i>Black to the Future: The State Action Doctrine and the White Jury</i> , 58 Washburn L.J. 103 (Winter 2019).....	12
Stephanie Domitrovich, <i>Jury Source Lists and the Community's Need to Achieve Racial Balance on the Jury</i> , 33 Duq. L. Rev. 39 (1994)	11
Washington Center for Court Research, <i>Juror Research Project Report to the Washington State Legislature</i> (Dec. 24, 2008)	12
Washington State Department of Labor & Industries, History of Washington Minimum Wage	9, 12

I. INTRODUCTION

Amici curiae affirmatively support as a matter of policy initiatives that increase all eligible citizens' participation on juries. But, a court may not rewrite unambiguous statutes to increase juror compensation— not even when the Legislature has failed to act. Our deep concerns about the separation of powers and the unintended consequences that can flow from violations of this doctrine motivated the Washington Association of Counties and the Washington State Association of County Clerks to file this brief.

II. INTEREST OF *AMICI CURIAE*

Washington State Association of Counties (“WSAC”) is a voluntary, non-profit association of elected county commissioners, county councils, and county executives from all of Washington's 39 counties. Created in 1906, WSAC provides a forum for networking and sharing best practices, and importantly provides a single voice for and on behalf of counties.

Given its membership, WSAC has a unique perspective on county budgets, appropriations, and the funding of county government. The issues presented in this case have important ramifications not only for potential jurors and all consumers of court services, but for the legislative authorities of county governments and their ability to fulfill mandatory statutory duties, particularly as to budgets and appropriations.

The Washington State Association of County Clerks (“WSACC”) is

an organization whose membership includes the elected County Clerks of Washington's 39 counties and their appointed counterparts in charter counties. WSACC coordinates the policies of County Clerk's offices, provides a forum for the study and discussion of subjects vital to the procedural practices and conduct of County Clerks, and promotes beneficial legislation and court rules. WSACC is an affiliate of the Washington Association of County Officials.

WSACC has a direct interest in the pending lawsuit. By statute and court rule, WSACC's members play an integral part in jury management. *See generally* GR 28(b)(1) (judges may delegate to clerks their authority to disqualify, postpone or excuse a potential juror from jury service); RCW 2.36.054 (county clerk to be consulted in creation of jury source list and master jury list); RCW 2.36.095 (county clerk to issue summons to persons selected for jury duty).

WSACC and its members are active participants in initiatives to increase citizen participation on juries. WSACC and its members demonstrate their commitment to increased participation of all eligible persons by service on various jury commissions, educational information on their websites, presentations to academic and citizen groups, collection of data, and e-mail or phone reminders to summoned jurors.

III. ARGUMENT

A. SIGNIFICANT HARM ARISES WHEN THE JUDICIAL BRANCH SUBSTITUTES ITS JUDGMENT FOR THAT OF THE LEGISLATIVE BRANCH.

Believing that significant public interests support increased juror compensation and frustrated by the Legislature's failure to increase juror compensation,¹ Nicole Bednarczyk and Catherine Selin (collectively "Petitioners") argue that this Court must make a "policy decision," Petition for Review at 2, and exercise its "power" to secure compensation for jurors beyond that granted to them by the Legislature in RCW 2.36.150. *Id.* at 10, 11. "A juror's right to compensation, however, is purely statutory and a matter of legislative and not judicial prerogative." *Patierno v. State*, 391 So.2d 391, 393 (Fla. Dist. Ct. App. 1980). *Accord State ex rel. Hastie v. Lamping*, 25 Wash. 278, 282, 65 Pac. 537 (1901) (a court may not increase compensation for jury duty beyond the terms of the statute that prescribes the compensation for jury service).

Washington has three branches of government: legislative, executive, and judicial. *See, e.g., Freedom Foundation v. Gregoire*, 178 Wn.2d 686, 696, 310 P.3d 1252 (2013). The legislative branch is responsible for

¹The legislature is aware of the issue. Numerous bills have been introduced over the years to increase compensation for jury duty. *See, e.g.,* H.B. 1937, 61st Leg. Sess. (Wn. 2009); S.B. 6779, 60th Leg. Sess. (Wn. 2008); S.B. 5454, 59th Leg. Sess. (Wn. 2005); S.S.B. 5072, 57th Leg. Sess. (Wn. 2001).

determining how to allocate funds. An appropriation for one purpose necessarily requires a decision by the legislature or board of county commissioners to remove funding from other priorities in the budget. If the legislative branch acts improvidently the remedy lies with the electors rather than in the courts. *State ex rel. Farmer v. Austin*, 186 Wash. 577, 588, 59 P.2d 379 (1936).

The consequences of judicial second guessing of legislative funding allocations, regardless of how misguided and harmful such policies may be, represents a greater threat to society than the harm caused by the allegedly inadequate appropriation. *See, e.g., Hillis v. Department of Ecology*, 131 Wn.2d 373, 390, 932 P.2d 139 (1997) (“While it may be very tempting for this Court to order the Legislature to appropriate . . . funds . . . , such action would violate the separation of powers doctrine Just because we do not think the legislators have acted wisely or responsibly does not give us the right to assume their duties or to substitute our judgment for theirs.”); *State ex rel. Farmer*, 186 Wash. at 588 (harm arising from reducing the number of sheriff deputies from six to four “will not be nearly as great as would be the consequences of the interference by the courts with the executive duties of the board of county commissioners, in whom is reposed the financial management of the county’s affairs.”). Courts, therefore, only order the expenditure of funds in excess of that authorized by statute or appropriated

by the legislative branch, when the constitution mandates the funding or when the courts' very own survival is imperiled from the lack of funds. *See generally Hillis*, 131 Wn.2d at 390 ("While there are special situations when the courts can and should order the expenditure of funds, specific appropriation to fund a statutory right, not involving constitutional rights or judicial functions, is normally beyond our powers to order." (footnote omitted)); *City of Ellensburg v. State*, 118 Wn.2d 709, 715, 826 P.2d 1081 (1992) (supreme court will not direct the Legislature to provide additional funding unless creation of the program and/or the funding thereof is constitutionally mandated); *In re Salary of Juvenile Director*, 87 Wn.2d 232, 552 P.2d 163 (1976) (the judiciary has the inherent authority to compel an appropriation of money only upon a showing by clear, cogent and convincing evidence that the current level of funding prevents the holding of court or the fulfillment of its constitutional duties). Neither situation is present here.

First, as explained *infra* in section III. B., increased jury compensation is not constitutionally mandated. Second, under the compensation authorized by RCW 2.36.150, prospective jurors are responding in sufficient numbers to allow trials to proceed in King County and around the state. *See generally* Caseloads of the Courts, Washington Courts of Limited Jurisdiction Jury

Trials Set and Held – January 2019 through July 2019² (972 jury trials held in all county district and municipal courts); Caseloads of the Courts Superior Court Criminal Trial Proceedings by Type of Proceeding – January 2019 through August 2019³ (525 superior court criminal jury trials held statewide); Caseloads of the Courts, Superior Court Civil Proceedings by Type of Proceeding – January 2019 through August 2019⁴ (93 superior court civil jury trials held statewide).

1. Increased Juror Compensation May Hurt the Very Individuals the Petitioners and Their *Amici Curiae* Seek to Help.

The Petitioners take the position that jurors must receive compensation under the Washington Minimum Wage Act in addition to the per diem required by RCW 2.36.150. *See* Appellants' Supplemental Brief at 17. The Petitioners contend that the fiscal consequences to King County⁵ of paying jurors for their time would be relatively "insubstantial." *Id.* at 18. While the cost of paying the increased juror compensation may, as claimed

²Available at <http://www.courts.wa.gov/caseload/?fa=caseload.showReport&level=d&freq=y&tab=&fileID=rpt15> (last visited Sep. 26, 2019).

³Available at <http://www.courts.wa.gov/caseload/?fa=caseload.showReport&level=s&freq=y&tab=criminal&fileID=crmpro2> (last visited Sep. 26, 2019).

⁴Available at <http://www.courts.wa.gov/caseload/?fa=caseload.showReport&level=s&freq=y&tab=civil&fileID=civproyr> (last visited Sep. 26, 2019).

⁵The Petitioners assume that the counties will be liable for the hourly wages that the new "juror employees" will receive. It is more likely that the state will be the responsible party. *See generally* RCW 43.135.060.

by Petitioners, have minimal impact upon King County's budget, the same cannot be true of all counties.

Counties have limited revenue streams from which to fund all essential government services. *See generally* Municipal Research and Services Center, *Revenue Guide for Washington Counties* (Feb. 2019).⁶ Funding for courts, including jury fees and jury administrative costs, must be found within the general budget. The majority of the general budget is devoted to personnel costs. An increase in juror compensation must be offset by either a decrease in non-mandatory services such as therapeutic courts⁷ or courthouse facilitators,⁸ a reduction of staff, or delayed maintenance and capital improvements. The impact of paying minimum wage to jurors can be devastating to a small or medium sized county.

Grays Harbor County is the 21st largest county by population.⁹ Grays

⁶This document is available at <http://mrsc.org/getmedia/4865001b-1f63-410a-a5ed-8d1ad8d752f3/Revenue-Guide-For-Washington-Counties.pdf.aspx?ext=.pdf> (last visited Sep. 24, 2019).

⁷*See, e.g., State v. Harner*, 153 Wn.2d 228, 103 P.3d 738 (2004) (no fundamental right to participate in a drug court); Chapter 2.30 RCW (therapeutic courts encouraged but no requirement that a county fund such courts).

⁸*See* RCW 26.12.240 ("A county may create a courthouse facilitator program to provide basic services to pro se litigants in family law cases."); RCW 11.88.170 ("A county may create a guardianship courthouse facilitator program to provide basic services to pro se litigants in guardianship cases.").

⁹Grays Harbor County's 2019 population is 74,160. *See* Municipal Research and Service Center ("MRSC"), Washington County Profiles. Available at <http://mrsc.org/Home/Research-Tools/Washington-County-Profiles.aspx?orderby=countypop&dir=down> (last visited Sep. 25, 2019).

Harbor's locally assessed current expense assessed value of \$ 6,241,880,892 is the 21st highest among Washington's counties.¹⁰ Grays Harbor County's 2017 actual general fund expenditures exceeded actual revenue by \$96,559.¹¹ Grays Harbor's superior court's 2017 actual expenditures represented 2.27 per cent of the actual general fund expenditures.¹²

The superior court's budget is lean. Judicial salaries consumed 31 per cent of the superior court's actual 2017 expenditures. Salaries and benefits of non-judicial staff comprised an additional 37.6 per cent of the court's actual 2017 expenditures.¹³

Grays Harbor Superior Court held three civil jury trials and 38 criminal trials in 2017.¹⁴ The jury fees and mileage for these trials amounted to \$76,094, or 9.4 percent of the superior courts actual 2017 budget.¹⁵ If the

¹⁰See MRSC, Tax and Population Data, County tax and population trends (Excel)-2010 to present (last updated July 2, 2019). Available at <http://mrsc.org/Home/Explore-Topics/Finance/Economic-and-Population-Data/Population-Property-and-Sales-Tax-Archive.aspx> (last visited Sep. 25, 2019).

¹¹Grays Harbor County 2019 Budget ("Budget") at ix. This document is available at <http://www.co.grays-harbor.wa.us/Commissioners/Documents/Budget/GHCBudget2019.pdf> (last visited Sep. 25, 2019).

¹²*Id.* at viii (2017 general fund actual expenditures of \$35,679,475; 2017 actual superior court expenditures of \$810,392).

¹³Budget at 48.

¹⁴Annual Caseload Report Superior Court 2017 Annual Report at 70, 98 (available <http://www.courts.wa.gov/caseload/content/archive/superior/Annual/2017.pdf> (last visited Sep. 24, 2019)).

¹⁵Budget at 48.

jurors who participated in these cases were to also receive minimum wage, at least an additional \$ 72,996.00 would be required.¹⁶ The funds necessary for these payments would have to come from Grays Harbor's reserves,¹⁷ necessitating personnel or service cuts in future years. The loss of even one sheriff's deputy can dramatically impact public safety by extending response times to domestic violence calls and increasing the likelihood that an impaired driver will not be interdicted.

To avoid a further decrease in county services, the legislature could offset a judicially mandated increase in jury compensation through higher fees. Washington's civil jury demand fee is the same regardless of the length of the trial. The \$125 civil jury demand fee for a six person jury and the \$250

¹⁶This figure was arrived at using conservative estimates. The calculation was based upon the \$11 statewide 2017 minimum wage, see Washington State Department of Labor & Industries, History of Washington Minimum Wage at <https://www.lni.wa.gov/WorkplaceRights/Wages/Minimum/History/default.asp> (last visited Sep. 24, 2019), and the following assumptions: (1) all 41 trials lasted only one day; (2) all civil jury trials consisted of six jurors; (3) no alternate jurors were seated; (4) only 24 jurors were summoned for criminal cases and only twelve jurors were summoned in civil cases (these numbers allow each side to exercise all authorized peremptory challenges, see RCW 4.44.130; CRLJ 38(d)(3); CrRLJ 6.4(e)(1); and (5) the workday lasted seven hours. The actual amount will be greater as at least one 2017 felony jury trial lasted 3 ½ days. See Dan Hammock, "Elma man found guilty of first-degree murder, arson in 2016 case," *The Vidette*, Oct. 26, 2017, Article available at <http://www.thevidette.com/news/elma-man-found-guilty-of-first-degree-murder-arson-in-2016-case/> (last visited Sep. 25, 2019) ("The murder trial started Tuesday, said Walker. The verdict was handed down just after 1 p.m. Friday.").

¹⁷Grays Harbor County's 2019 general fund expenditures are anticipated to exceed revenue by \$1,346,330. Budget, at ix. The actual gap would increase if additional compensation must be found for the jurors who participated in the 28 felony jury trials conducted between January 2019 and August 2019. See Caseloads of the Courts, Caseload Report for August 2019, available at <http://www.courts.wa.gov/caseload/?fa=caseload.showIndex&level=s&freq=y&tab=civil> (last visited Sep. 25, 2019).

civil jury demand fee for a twelve person jury,¹⁸ while sufficient to pay the per diem mandated in RCW 2.36.150 for the first day of trial, is insufficient to offset the current 2019 Washington minimum wage of \$504 for a six person jury and \$1008 for a twelve person jury for each 7-hour work day. If Washington were to follow the lead of the only jurisdiction that currently links juror compensation to its minimum wage, litigants' portion of jury costs would rise dramatically resulting in fewer individuals being able to pay the price to vindicate their rights.

In New Mexico juror compensation has been tied to the minimum wage since 1969. *See* New Mexico Laws 1969, ch. 222, § 15 (currently codified as N.M. Stat. Ann. 38-5-15).¹⁹ To offset its \$7.50 per hour minimum wage,²⁰ the state requires civil litigants to pay an additional jury demand fee

¹⁸*See* RCW 12.12.030; RCW 36.18.016(3).

¹⁹Jurors in New Mexico are not "employees" under the New Mexico minimum wage acts. They receive minimum wage because N.M. Stat. Ann. § 38-5-15, which may be found in the article addressing drawing and empaneling jurors of the chapter addressing trials states that:

Persons summoned for jury service and jurors shall be reimbursed for travel in excess of forty miles round trip from their place of actual residence to the courthouse when their attendance is ordered at the rate allowed public officers and employees per mile of necessary travel. Persons summoned for jury service and jurors shall be compensated for their time in attendance and service at the highest prevailing state minimum wage rate.

²⁰*See* New Mexico Department of Workforce Solutions, Minimum Wage Information, available at <https://www.dws.state.nm.us/Minimum-Wage-Information> (last visited Sep. 25, 2019).

of \$150 for a six person jury and \$300 for a twelve person jury. *See* New Mexico Rule 1-038 NMRA. Civil litigants must pay an additional \$150 for a six person jury and \$300 for a twelve person jury the morning of the second day of trial and the morning of each subsequent day of trial. *Id.* Despite New Mexico's higher jury demand fee, the available funds for juror compensation are occasionally insufficient to meet the need. *See, e.g.,* KANW-FM, "The Latest: New Mexico courts say jury money almost gone," Feb. 27, 2017 (absent an emergency appropriation money to pay jurors will run out in early March).²¹

2. Increased Juror Compensation is Not a Silver Bullet

Jury diversity is an important governmental goal. Many factors contribute to a lower level of low-income and minority persons on petit juries. Residents who are not registered to vote²² and who do not possess a driver's license or identicard are not included on the jury source list. People

²¹Available at <https://www.kanw.com/post/latest-new-mexico-courts-say-jury-money-almost-gone> (last visited Sep. 21, 2019)

²²*See, e.g.,* Final Report, The Nebraska Minority and Justice Task Force, State Justice Institute (Jan. 2003) ("Several studies, including other state research efforts, have concluded that voter registration lists alone create disproportionate representation of minorities."); Hiroshi Fukurai et al., *Race and the Jury: Racial Disenfranchisement and the Search for Justice* 18-21 (1993) (collecting studies documenting under representation on voter registration lists); Stephanie Domitrovich, *Jury Source Lists and the Community's Need to Achieve Racial Balance on the Jury*, 33 Duq. L. Rev. 39, 42 (1994) ("Census data indicate that a substantially higher percentage of middle-class Caucasians register to vote than do minorities or the poor, and the rate of voter registration is highest among middle-class Caucasians.").

move and do not receive their jury summons.²³ Prospective jurors frequently ignore the summons when they do receive them.²⁴ Many jurors who do respond request hardship excuses for a variety of reasons, including finances.

While the Petitioners allege that paying jurors minimum wage will increase diversity on juries,²⁵ the evidence does not support their thesis. Washington's pilot project in which jurors in three sites were paid \$60 per day, an amount that approximated the minimum wage,²⁶ concluded that there was no clear association of increased pay with higher juror yield. *See* CP 108-126 (Washington Center for Court Research, *Juror Research Project Report to the Washington State Legislature* at 13 (Dec. 24, 2008)).

A 2007 study conducted by the Center for Jury Studies revealed that

²³Minority and poor individuals experience greater mobility than others in the community. This results in a greater portion of summons returned by the post office from these communities than from others. *See, e.g.,* Nancy J. King, *Racial Jurymantering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707, 714 n.19 (1993) ("Of questionnaires that were delivered but not returned, 26% were sent to African Americans compared to 6% to whites.").

²⁴Some people fail to respond because they simply do not want to serve as jurors, and others assume that they will not be eligible for jury service, or cannot afford to miss work and are not confident they will be able to secure an exemption. Due to correlations between race and economic status it appears that African-Americans and Latinos fail to respond to jury summons at a disproportional rate. When income is controlled for, the response rate for African-Americans and Latinos is the same as whites. *See* Nina W. Chernoff, *Black to the Future: The State Action Doctrine and the White Jury*, 58 Washburn L.J. 103, 123-124 (Winter 2019).

²⁵*See* Appellant's Answer to *Amicus* Brief of King County Department of Public Defense at 3.

²⁶Washington's minimum wage during this period of time was \$7.63 an hour for 2006, and \$7.93 an hour in 2007. *See* Washington State Department of Labor & Industries, *History of Washington Minimum Wage*.

Washington's jury yield exceeded that of New Mexico. *See* Hon. Gregory E. Mize (ret.), *et al*, *The State-of-the States Survey of Jury Improvement Efforts: A Compendium Report* (Apr. 2007).²⁷

	New Mexico	Washington	All State Courts
Juror Compensation	State minimum wage of \$41.20 per day	\$10 to \$25 per day	Flat rate average \$21.95 Graduated rate average \$32.34
% Undeliverable	17.6	18.5	14.7
% Disqualified	7.4	8.1	8.4
% Non-response	19.6	11.5	8.7
% Exempt	3.4	8.6	7.8
% Excused	24.8	11.1	9.2
% Deferred	3.8	8.1	5.4
% Qualified and Available	23.4	34	45.8

B. INCREASED JUROR COMPENSATION IS NOT CONSTITUTIONALLY REQUIRED.

Although the Petitioners did not assert that RCW 2.36.150 is constitutionally infirm or that a payment of \$10 per day is constitutionally

²⁷ The full report is available at <http://www.ncsc-jurystudies.org/~media/Microsites/Files/CJS/SOS/SOSCompendiumFinal.ashx> (last visited Sep. 25, 2019). The local court survey results for Washington and all other jurisdictions are available at <http://www.ncsc-jurystudies.org/State-of-States-Survey/Results-by-State.aspx> (last visited Sep. 25, 2019).

deficient in the trial court,²⁸ they rely upon fair cross-section cases and equal protection cases to argue that the current system violates RCW 2.36.080(3)'s prohibition upon excluding citizens from jury duty on account of economic status.²⁹ Petitioners rely upon cases construing the Sixth Amendment and the Equal Protection Clause of the Fourteenth Amendment as there is no evidence that the Legislature intended RCW 2.36.080(3) to be more protective than either the state or the federal constitutions.

Chapter 2.36 RCW addresses the creation of the jury source list, the master jury list, and the selection of the venire. The lists from which the jury source list and the master jury list are drawn are open to every eligible voter, regardless of income. *See generally* RCW 2.36.055. Every eligible person whose name appears on the jury source list and the master jury list, regardless of income, have an equal chance of being summoned for service. *See generally* RCW 2.36.065 (random selection of jury panels). This is all that is constitutionally required.

The Petitioners contend that equal opportunity alone is insufficient. Instead they argue that RCW 2.36.080(3) requires that the government

²⁸See CP 155-196 (response to motion for summary judgment); VRP 8/4/2017 at 6 ("We agree that this is a matter for the legislature, and we are asking this Court to interpret the statute.").

²⁹See, e.g., Appellants' Supplemental Brief at 6, 8-9; Appellants' Opening Amended Brief at 17-22.

remove financial obstacles that are more acute for people of low economic status who are not otherwise compensated by an employer. *See* Petition for Review at 12-15. The Petitioners' position is foreclosed by precedent.

1. No Constitutional Right to Any Compensation for Performing Civic Duties

Citizenship carries with it certain responsibilities, including a duty to provide testimony and evidence. Compensation is not owed for deprivation of property in connection with a criminal investigation, lost wages while held as a material witness or testifying, or compensation for the cost of gathering and producing evidence. *See, e.g., Hurtado v. United States*, 410 U.S. 578, 93 S. Ct. 1157, 35 L. Ed. 2d 508 (1973) (material witness); *Blair v. United States*, 250 U.S. 273, 281, 39 S. Ct. 468, 471, 63 L. Ed. 979 (1919) (witness); *Daly v. Multnomah County*, 14 Ore. 20, 12 P. 11 (1886) (witness);³⁰ *Eggleston v. Pierce County*, 148 Wn.2d 760, 64 P.3d 618 (2003) (seizure and preservation of evidence).

Jury service, while a privilege of citizenship, is also a duty. *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 222-24, 66 S. Ct. 984, 90 L. Ed. 2d 1181 (1946). While jury service can necessitate personal sacrifice and decreased earning power, it is a part of the necessary contribution of the individual to

³⁰This case was decided under Oregon Const. art. 1, § 18 (1857). This provision is comparable to Washington Const. art. I, § 16. Oregon makes no distinction between the taking of property and the demanding of services under this provision. *Emery v. State*, 297 Ore. 755, 688 P.2d 72, 79 (1984).

the welfare of the public. *Id.* at 224 (jury duty “cannot be shirked on a plea of inconvenience or decreased earning power.”). A person performing this duty is entitled to no compensation beyond what the Legislature chooses to provide. *Lamping*, 25 Wash. 278 at 282 (1901).

2. The Equal Protection Clause Does Not Require the State to Eliminate All Inequalities Between the Rich and the Poor

All individuals who satisfy the qualifications to serve on juries (hereinafter “qualified jurors”), have a personal constitutional equal protection right to an equal opportunity to serve on a jury. *See generally J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140-41, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994) (individual jurors have a right to nondiscriminatory jury selection procedures). This constitutional principle is part of state policy. *See* RCW 2.36.080(1) (“It is the policy of this state . . . that all qualified citizens have the opportunity . . . to be considered for jury service in this state”); RCW 2.36.080(3) (“A citizen shall not be excluded from jury service in this state on account of membership in a protected class recognized in RCW 49.60.030, or on account of economic status.”).

The random jury selection procedures contained in chapter 2.36 RCW protect a qualified jurors’ equal protection rights by ensuring that each qualified juror has an equal chance of being summoned for jury duty. Any citizen who registers to vote, regardless of his or her race, age, gender,

wealth, or employment status, will be included on the jury source list from which the master jury list and jury panels are randomly selected. *See generally* RCW 2.36.054; RCW 2.36.055; RCW 2.36.065; GR 18. Any citizen who possesses a driver's license or an identicard, regardless of his or her race, gender, wealth, or employment history, will also be included on the jury source list from which the master jury list and jury panels are randomly selected. RCW 2.36.054; RCW 2.36.055; RCW 2.36.065; GR 18.

While acknowledging that chapter 2.36 RCW is facially neutral, the Petitioners claim that the failure to pay jurors a wage in addition to the minimal per diem mandated by RCW 2.36.150 places a greater burden upon low income jurors who are not otherwise compensated by an employer for their time on a jury. Appellants' Supplemental Brief at 8. Petitioners, citing to *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966), contend that the current "situation is akin to but worse than a poll tax." Appellants' Supplemental Brief at 8. The Petitioners' analogy is misplaced as the equal protection clause does not require a state to eliminate all inequalities between the rich and the poor. *Madison v. State*, 161 Wn.2d 85, 104, 163 P.3d 757 (2007).

In *Harper*, the United States Supreme Court recognized that "[w]ealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process." 383 U.S. at 668. Consistent

with this recognition, the Court held that requiring the payment of a fee as a condition of obtaining a ballot causes an “invidious” discrimination that runs afoul of the Equal Protection Clause. *Id.* The Equal Protection Clause is not, however, violated by government’s failure to offer options, such as expanded periods for early voting, same day registration, or longer poll hours, that might ameliorate the disparate burden felt by some low income voters. *See, e.g., Ohio Democratic Party v. Husted*, 834 F.3d 620 (6th Cir. 2016).

In *Thiel*, the United States Supreme Court held that economic standing has no relationship to a citizen’s competence as a juror. 328 U.S. at 223. Accordingly, the Equal Protection Clause prohibits requiring the payment of any fee as a condition to placement on the jury source list. The Equal Protection Clause does not, however, require the payment of compensation to jurors to ameliorate the disparate hardship that lower income persons might experience while serving on a petit jury.

The jury source list is drawn from a list of all registered voters and a list of licensed drivers and identicard holders residing in the county. RCW 2.36.055; GR 18. Every qualified person can secure their place on the jury source list at no cost by registering to vote. *See* Chapter 29A.08 RCW (no fee charged to register). Registration to vote is not dependent upon owning property or even living in a traditional residence. *See* RCW 29A.08.112 (a voter who resides in a shelter, park, or other identifiable address will be

registered to vote). Registration to vote may be accomplished at numerous locations, by mail, and electronically. *See, e.g.*, RCW 29A.08.120 (electronic registration); RCW 29A.08.123 (mail registration); RCW 29A.08.340 (driver licensing facilities); RCW 29A.08.310 (designated state agencies).

The statutory prohibition upon excluding a citizen from jury service on account of economic status contained in RCW 2.36.080(3), does not apply to the selection of the petit jury. *See* RCW 2.36.080(4) ("This section does not affect the right to peremptory challenges under RCW 4.44.130, the right to general causes of challenge under RCW 4.44.160, the right to particular causes of challenge under RCW 4.44.170, or a judge's duty to excuse a juror under RCW 2.36.110."). A potential juror's equal protection rights are guarded in this area by the constitutional prohibition against race based and gender based challenges.³¹ *See generally J.E.B. v. Alabama ex rel. T.B., supra; Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). An improperly excluded juror has standing to bring suit on his or her own behalf. *Powers v. Ohio*, 499 U.S. 400, 414, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991). In this case, neither Ms. Bednarczyk nor Ms. Selin was the subject of a peremptory strike.

³¹Procedural rules in Washington presume that certain "neutral" grounds for exercising a peremptory challenge are proxies for race. One of the presumptively invalid reasons for a peremptory challenge is related to the jurors economic status. *See* GR 37(h)(vi) ("receiving state benefits.").

3. The Constitutional Right to an Impartial Jury Drawn from a Fair Cross Section of the Community is Not Violated by the Private Choices of Potential Jurors

In criminal cases, the Sixth Amendment grants a defendant the right to be tried by an impartial jury drawn from sources reflecting a fair cross section of the community. *See Taylor v. Louisiana*, 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975). It is also a policy of this state that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court. RCW 2.36.080(1).

A violation of the Sixth Amendment fair cross section right occurs when government action systematically excludes a cognizable group from the master jury list. *See Duren v. Missouri*, 439 U.S. 357, 99 S. Ct. 664, 58 L. Ed.2d 579 (1979). The procedures contained in chapter 2.36 RCW do not exclude anyone from the jury source list of the master jury list based upon race or economic status. In fact, "Washington's method of creating a jury list is broader and more inclusive than required by law." *State v. Cienfuegos*, 144 Wn.2d 222, 232, 25 P.3d 1011 (2001).

Petitioners do not dispute that a qualified person's economic status plays no part in his or her inclusion on the jury source list. Instead, they contend that the financial hardship experienced by low wage earners results in their under representation on petit juries. There is no requirement, however, that petit juries actually chosen must mirror the community and

reflect the various distinctive groups in the population. *Taylor*, 419 U.S. at 538.

Non-governmental action, such as relocation by perspective jurors or non-response to summons that may occur disproportionately among various discrete groups, does not violate the Sixth Amendment fair cross-section requirement. *See, e.g., United States v. Orange*, 447 F.3d 792, 800 (10th Cir. 2006) (“Discrepancies resulting from the private choices of potential jurors do not represent the kind of constitutional infirmity contemplated by *Duren*.”); *United States v. Rioux*, 97 F.3d 648, 658 (2nd Cir. 1996) (“The inability to serve juror questionnaires because they were returned as undeliverable is not due to the system itself, but to outside forces, such as demographic changes.”); *United States v. Cecil*, 836 F.2d 1431, 1447 (4th Cir. 1988) (noting that disparities attributable to “personal predilection” cannot form the basis of a fair cross-section claim).

Granting hardship exemptions to individuals summoned for jury duty on an individual basis will also not support a fair cross-section claim as a state “has a significant interest [in] avoiding undue burdens on individuals” by allowing such excuses. *Smith v. Berghuis*, 543 F.3d 326, 345 (6th Cir. 2008), *rev’d on other grounds by Berghuis v. Smith*, 559 U.S. 314, 130 S. Ct. 1382, 176 L. Ed. 2d 249 (2010). *See also Thiel*, 328 U.S. at 224, 66 S. Ct. 984, 90 L. Ed. 1181 (1946) (proper to excuse a daily wage earner for whom

jury service would entail an undue financial hardship, but not to automatically exclude such persons). Numerous courts have determined that neither their state nor the federal constitution obliges local government to increase jury fees or otherwise ameliorate the economic hardship caused by jury duty. *See, e.g., People v. Burgener*, 62 P.3d 1, 20-21 (Cal. 2003) (no duty to increase compensation); *State v. Roberts*, 948 S.W.2d 577, 603 (Mo. 1997) (no duty to provide child care).

IV. CONCLUSION

WSAC and WSACC respectfully request that this Court exercise restraint and not usurp the Legislature's authority.

Respectfully submitted this 27th day of September, 2019.



Pamela B. Loginsky, WSBA No. 18096
Washington Association of Prosecuting Attorneys
206 10th Ave. SE
Olympia, WA 98501
Telephone: 360-753-2175
pamloginsky@waprosecutors.org

PROOF OF SERVICE

I, Pamela B. Loginsky, declare that I have personal knowledge of the matters set forth below and that I am competent to testify to the matters stated herein.

On the 27th day of September, 2019, pursuant to the agreement of the Petitioners and *amici curiae*, an electronic copy of the document to which this proof of service is attached was served upon the following individuals via the CM/ECF System and/or e-mail:

Heidi Jacobsen-Watts at Heidi.Jacobsen-Watts@KingCounty.gov and at paoappellateunitmail@kingcounty.gov

Karen Pool-Norby at Karen.pool-norby@kingcounty.gov

David Hackett at David.hackett@kingcounty.gov

Janine Joly at janine.joly@kingcounty.gov

Anita Khandelwal at anita.khandelwal@kingcounty.gov

Robert S. Chang changro@seattleu.edu

Cynthia Heidelberg at cheidelberg@bjtlegal.com and at admin@bjtlegal.com

Elizabeth Ford at forde@seattleu.edu

Jeffrey Needle at jneedle@wolfenet.com

Melissa Lee at leeme@seattleu.edu

Jessica Levin at levinje@seattleu.edu

Michael Subit at msubit@frankfreed.com and
jpitre-williams@frankfreed.com

Lorinda Youngcourt at lorinda.youngcourt@fd.org


rmunozcintron@kingcounty.gov

Nancy Talner at talner@aclu-wa.org

Toby J. Marshall at tmarshall@terrellmarshall.com

Jamal Whitehead at whitehead@sgb-law.com

Signed under the penalty of perjury under the laws of the state of
Washington this 27th day of September, 2019, at Olympia, Washington.

A handwritten signature in cursive script, reading "Pamela B. Loginsky".

PAMELA B. LOGINSKY, WSBA No. 18096
Special Deputy Prosecuting Attorney

WASHINGTON ASSOC OF PROSECUTING ATTY

September 27, 2019 - 3:33 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 96990-6
Appellate Court Case Title: Nicole Bednarczyk, et al. v. King County
Superior Court Case Number: 16-2-10105-0

The following documents have been uploaded:

- 969906_Briefs_20190927153034SC812983_2974.pdf
This File Contains:
Briefs - Amicus Curiae
The Original File Name was Filed WSAC and WSACC Amici Brief.pdf
- 969906_Motion_20190927153034SC812983_3283.pdf
This File Contains:
Motion 1 - Amicus Curiae Brief
The Original File Name was Filed WSAC and WSACC Motion to file Amici Brief.pdf
- 969906_Motion_20190927153034SC812983_6088.pdf
This File Contains:
Motion 2 - Overlength Brief
The Original File Name was Filed Motion to file overlenght amici brief.pdf

A copy of the uploaded files will be sent to:

- Heidi.Jacobsen-Watts@KingCounty.gov
- Karen.pool-norby@kingcounty.gov
- admin@bjtlegal.com
- anita.khandelwal@kingcounty.gov
- changro@seattleu.edu
- cheidelberg@bjtlegal.com
- david.hackett@kingcounty.gov
- forde@seattleu.edu
- janine.joly@kingcounty.gov
- jlarm-bazzill@frankfreed.com
- jneedlel@wolfenet.com
- leeme@seattleu.edu
- levinje@seattleu.edu
- lorinda.youngcourt@fd.org
- msubit@frankfreed.com
- paoappellateunitmail@kingcounty.gov
- rmunozcintron@kingcounty.gov
- talner@aclu-wa.org
- tmarshall@terrellmarshall.com
- whitehead@sgb-law.com

Comments:

Address:

206 10TH AVE SE

OLYMPIA, WA, 98501-1311

Phone: 360-753-2175

Note: The Filing Id is 20190927153034SC812983